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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

JOYCE C. THORPE, *Petitioner,*

v.

HOUSING AUTHORITY OF THE CITY OF DURHAM.

BRIEF OF THE HOUSING AUTHORITY OF THE CITY OF DURHAM IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

QUESTION PRESENTED

Did the Supreme Court of North Carolina decide a Federal question of substance in a way probably not in accord with applicable decisions of the Supreme Court of the United States in holding that a local Housing Authority could successfully maintain an action in ejectment in the State Courts by showing it had complied with the terms of its lease and the general law of this State applicable to landlord and tenant, in the absence of any finding that the tenant was discriminated against or evicted for any unlawful reason?

STATEMENT

The Petitioner and the Housing Authority of the City of Durham, on the 11th day of November 1964, entered into a written lease, leasing to the Petitioner, Thorpe, an apartment in a building owned by the Housing Authority of the City of Durham for a term beginning November 11, 1964, and terminating at midnight November 30, 1964 (R. 18). The lease provided that it would automatically be renewed for successive terms of one month each and that the Housing Authority could prevent such automatic renewal by giving to the tenant notice, in writing, of such intention fifteen days prior to the last day of the term, and that the tenant could prevent the automatic renewal by giving a like notice to the Housing Authority. There was no provision in the lease requiring a reason to be assigned for a decision not to renew the lease by either party. On the 12th day of August 1965, the Housing Authority gave written notice to the Petitioner that the lease would not be renewed after the term ending August 31, 1965, (R. 4). After the term ended on August 31, 1965, the Petitioner, Thorpe, refused to vacate the premises and continued to occupy same (R. 5).

The Housing Authority brought an action in Summary Ejectment before a Justice of the Peace in Durham County (R. 5); and after a hearing before the Justice of the Peace, participated in by the Petitioner, Thorpe, and her counsel, Judgment was entered by the Court requiring the defendant, Thorpe, to vacate the premises. The Petitioner then gave notice of appeal to the Superior Court of North Carolina (R. 5).

Upon the case coming on for hearing in the Superior Court of Durham County, North Carolina, both parties waived trial by jury and stipulated that the Judge

presiding should find the facts upon the stipulations made and affidavits filed and render thereon judgment (R. 2). In her affidavit filed in this action, the Petitioner, Thorpe, asserted that the reason for her eviction was her efforts to organize the tenants of McDougald Terrace, the housing project belonging to the Housing Authority (R. 15). It was stipulated by both parties that it was alleged by the Petitioner, Thorpe, that the reason she was being evicted was due to her participation in the organization of the Parent's Club in the McDougald Terrace Project (R. 13).

The Superior Court then found as fact that the Housing Authority was the owner of the property occupied by the Petitioner, Thorpe; that the lease was duly executed; that the Petitioner, Thorpe, duly received a written notice from the Housing Authority terminating a lease effective August 31, 1965; that the Petitioner, Thorpe, failed to vacate the premises after the 31st day of August, 1965; and that the organizational activity of the Petitioner was not the reason for giving her notice that the lease would not be renewed (R. 2-7).

The Petitioner then appealed to the Supreme Court of North Carolina, and there the judgment of the Superior Court was affirmed.

REASONS FOR DENYING THE WRIT

I.

There Is No Conflict Between the Decisions of This Court and the Judgment Below.

No decision of this Court has been found which is squarely in point. In numerous cases, this Court has protected the constitutional rights of an individual when his job was placed in jeopardy by an unconstitutional requirement of a Governmental Agency. Of these

cases the Petitioner cites *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Slochower* v. *Board of Education*, 350 U.S. 551 (1956); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *Wieman* v. *Updegraff*, 344 U.S. 183 (1952); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); and *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957).

Greene v. *McElroy, supra*, did not involve a constitutional decision, the Court saying: "The type of hearing was the product of administrative decision not explicitly authorized by either Congress or the President. Whether those procedures under the circumstances comport with the Constitution we do not decide." In *Slochower*, a teacher was discharged for invoking the Fifth Amendment before a Congressional Committee. In *Schware*, an applicant was arbitrarily denied the right to take a bar examination. In *Cramp*, a teacher was required to take an unconstitutionally vague loyalty oath. In *Wieman*, a public employee was required to take an unconstitutional loyalty oath. In *Torcaso*, a Maryland requirement that a public office holder declare his belief in God was unconstitutional. In *Shelton*, a teacher could not be compelled to file annually an affidavit listing every organization to which he had belonged within the preceding five years as a condition of employment.

On the other hand in *Beilan* v. *Board of Education*, 357 U.S. 399 (1958), it was held a Board of Public Education of Philadelphia could discharge a teacher who refused to answer questions asked by his Superintendent without violating the Constitution. And in *Cafeteria and Rest Workers Union* v. *McElroy*, 367 U.S. 886 (1961), it was held that a Commander of a Mili-

tary Base could, without notice or assignment of reason, discharge a civilian employee on the Base without violating any provision of the Constitution.[1]

In the other case cited by Petitioner, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951), this Court held that an allegation that the Attorney General included an organization in a list of groups designated by him as Communists and transmitted such list to the Loyalty Review Board, all with-

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[1] In *Cafeteria and Rest Workers Union* v. *McElroy*, the Court said: "As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with the determination of the precise nature of the Government function involved as well as of the private interest that has been affected by Governmental action. Where it has been possible to characterize that private interest (perhaps an oversimplification) as a mere privilege subject to the Executives plenary power, it has traditionally been held that notice and hearing are not constitutionally required. . . .

"What then was the private interest affected by Admiral Tyree's action in the present case? It most assuredly was not the right to follow a chosen trade or profession. Rachel Brawner remained entirely free to obtain employment as a short-order cook or to get any other job, either with M & M or with any other employer. All that was denied her was the opportunity to work at one isolated and specific military installation.

"Moreover, the governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession or to control an entire branch of private business, but rather, as proprietor, to manage the internal operation of an important Federal military establishment.

"Thus, the nature both of the private interest . . . and the governmental power which has been exercised makes this case quite different from that of the lawyer in *Schware, supra,* the physician in *Dent, supra,* and the cook in *Raich, supra,* . . . .

"We may assume that Rachel Brawner could not constitutionally have been excluded . . . if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist."

out notice or hearing, stated a cause of action in the Federal Courts.

In *Sherbert* v. *Verner*, 374 U.S. 398, an unemployment compensation claimant who refused to work on Saturday because of her religious beliefs could not constitutionally be denied unemployment compensation for that reason, that being in violation of the Free Exercise Clause of the First Amendment.

None of these cases dealt with an election by an employer not to renew a contract of employment having ended at a fixed term. In all of these employment cases cited by Petitioner, there was something that the employee had to do or refrain from doing as a condition of his continued employment and those conditions were unconstitutional. There was always something more involved than just a decision to fire an employee.

Moreover, the private interest in the case at bar was to renew a lease which, by its terms, could not be renewed over objection by either landlord or tenant. If the local Housing Authority exercised any governmental function here, it was, as proprietor, to manage the internal operation of its housing units. Neither of these circumstances brings this case within the purview of any of the decisions of this Court holding actions of administrative agencies unconstitutional.

The North Carolina Housing Authority Law gives the Housing Authority ample power to enter into the lease, as is set forth in the record;[2] and such lease is not in violation of any Federal statute. The whole body of the State and Federal Legislation and Public Housing Administration Regulations have, since the beginning, contemplated the use of leases to govern

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[2] N.C. G.S. 157-9 shown on page 24a of Petition.

the occupancy of dwelling units. The North Carolina Housing Authority Law specifically gives the Housing Authority the right to own this property and to lease the dwelling units therein. While there is careful limitation on the power of the Housing Authority to lease its dwelling units, insofar as the income of the potential tenants is concerned,[3] there is no stautory limitation upon the length of the term of any lease nor the conditions set upon the renewal of any lease.

The Housing Authority of the City of Durham did not perform a governmental function in its decision not to renew the Petitioner's lease. It did not purport to place the Petitioner on a list nor to classify her, and had no authority to do so. It did not purport to enact legislation, to prescribe rules having the effect of legislation.

The Housing Authority did not here purport to act as a Court or a Quasi Court, but took its case into the Courts of this State in a manner similar to any other private landlord.[4] In the State Courts, the Petitioner asserted her claim that she was being evicted because of her organizational activities, but the Court found as a fact that this was not the case (R. 5). On this record, the Petitioner seems reduced to the argument that the Housing Authority, as a sort of Quasi Court, should have held a pre-trial hearing before going into the Courts of the State, or should have proved a motive, acceptable to the Courts, upon the trial; and absent this, due process was not had. The Petitioner had ample opportunity to examine and cross-examine the Executive Director of the Housing Authority, either

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[3] N.C. G.S. 157-29 shown on page 28a of Petition.

[4] G.S. 42-26, G.S. 42-31, G.S. 42-34—see appendix this Brief, pages 1a and 2a.

before or during the trial in the courts below and by appropriate discovery proceedings to examine any other officers or agents of the Housing Authority with respect to any pertinent question involved in the proceedings including motives, if any, for the eviction.[5] She did assert that the Housing Authority's motive in giving her notice that her lease would not be renewed was her organizational activities in the housing project, but the trial court found against her on this issue of fact. The Supreme Court of North Carolina on this record was clearly entitled to treat this as any other summary ejectment proceeding.

II.

There Is No Significant Conflict Among the Decisions of Lower Courts Upon the Issue Raised Here.

Walton v. *City of Phoenix*, 69 Ariz. 26, 208 P. 2d 309 (1949), *Chicago Housing Authority* v. *Ivory*, 341 Ill. App. 282, 93 NE 2d 386 (1950), *Brand* v. *Chicago Housing Authority* (CCA 7) 120 F. 2d 786 (1941), *Pittsburgh Housing Authority* v. *Turner*, 201 Pa. Super. 62, 191 A. 2d 869 (1963), *Columbus Metropolitan Housing Authority* v. *Simpson*, 85 Ohio App. 73, 85 NE 2d 560 (1959) are all in accord with the decision of the North Carolina Supreme Court in this case and are, on the facts presented, directly in point.[6]

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[5] G.S. 1-568.10 & G.S. 1-568.11—see appendix this Brief, pages 3a and 4a.

[6] In *Walton* v. *City of Phoenix*, (69 Ariz. 26, 208 P.2d 309 (1949)), Undall, Justice, said in delivering opinion of Court: "It would seem to be defendant's contention that these state statutes (eviction statutes) have no application to other than private landlords and that insofar as the plaintiff is concerned the whole matter is governed and controlled by the United States Housing Act of 1937 as amended. Defendants, however, fail to direct our attention to any specific provisions of the Act which

In *Chicago Housing Authority* v. *Blackman,* 4 Ill. 2d 319, 122 N.E. 2d 522 (1954), tenants were served with notices terminating their tenancies for failure and refusal to subscribe to the Loyalty Oath required by Illinois Statute. In *Housing Authority of Los Angeles* v. *Cordova,* 130 Cal. App. 2d Supp. 883, 279 P. 2d 215 (1955), in a suit to evict tenants, the tenants filed answer alleging that the termination of their lease was unlawful in that the only reason therefor was tenants' refusal to sign a certificate that they were not members of organizations designated by the Attorney General of the United States as subversive. The Court denied the Housing Authority's motion for summary judgment on the pleadings, and the cause was remanded for trial upon the issues tendered. In *Lawson* v. *Housing Authority of Milwaukee,* 270 Wisc. 269, 70

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support this theory. As a matter of fact, a reading of the entire act, with its amendments, as well as the related Federal Acts on National Housing, Title 50 U.S.C.A. War Appendix, leads one irresistibly to the opposite conclusion." In *Brand* v. *Chicago Housing Authority,* the Court said: "Any property right acquired by the plaintiffs was circumscribed by the terms and conditions upon which it was founded. True, as tenants, they acquired the right of possession, but this right was limited by the terms of the lease by which such right was obtained. By express provision thereof, either party was entitled to cancellation on fifteen days' notice to the other. It is our opinion that this provision with reference to the termination of the tenancy is valid and binding upon the plaintiffs in the same manner as though the lessor had been a private person rather than a Governmental Agency. . . . The fact that the Government selected plaintiffs as the object of such beneficence does not preclude it from determining at a later time that the purpose of the Act will be better served by the selection of some other family of the same or lower income class. To hold, as plaintiff would have us do, that the mere selection of a tenant carries with it a continuing right of tenure irrespective of the terms and conditions upon which the tenancy was founded, would not only contravene the purpose and policy of the Act, but would come near to destroying it."

N.W. 2d 605 (1965), the Housing Authority passed a Resolution which provided for non-membership in any organization designated as subversive by the Attorney General of the United States as a condition of eligibility for continued occupancy, and tenants brought the action for a declaratory judgment adjudicating said Resolution invalid and unconstitutional. The Court overruled a Demurrer to that Petition. In *Holt* v. *Richmond Housing Authority,* (E.D. Va. C.A. No. 4746 (1966)), the Court found as a fact that the tenant was given a notice of termination because he was President of the Civic Association. The Court cites *Housing Authority* v. *Thorpe,* the judgment of the Court below in case at bar, and said: "There, however, the Court found as a matter of fact that whatever may have been plaintiff's reason for terminating the lease, it was neither because the defendant had engaged in efforts to organize the tenants nor because she had been elected President of a tenant's group. It is that factual distinction which make that decision inapplicable to case at bar."

Rudder v. *United States,* 226 F. 2d 51 (D.C. Cir. 1955), and *Kutcher* v. *Housing Authority of Newark,* 20 N.J. 181, 119 A. 2d 1 (1955), where likewise cases holding that the efforts of the Housing Authorities to enforce the provisions of the so-called Gwinn Amendment enacted by the United States Congress in 1953 did not meet the requirements of due process.[7]

All of these cases are consistent with the decision of the North Carolina Supreme Court in this case. These

[7] The Gwinn Amendment provided "No housing unit constructed under the United States Housing Act of 1937, as amended, shall be occupied by a person who is a member of an organization designated as subversive by the Attorney General . . ."

cases stand for the proposition that the Petitioner should assert the impropriety of the Housing Authority's motives or reasons for failing to renew her lease in the Courts of the land, including any effort by the Housing Authority to enforce the Gwinn Amendment. This she, in fact, did in this case and the Court found the facts against her. None of these cases suggested the invalidity of the form of leases used by the Housing Authorities and described in the letter from the Assistant Secretary for renewal and housing assistance, Department of Housing and Urban Development, which is set forth in Note 7 on page 9 of the Petition in this case.

The cases decided by lower Federal Courts involving the expulsion of students before they had finished their term of study are clearly not analogous. For one thing, there was no question of refusing to renew a contract, the term of which had expired, by notice provided for in the Contract. For another, there was evidence and there were findings that those expulsions were punitive measures taken because of student participation in Civil Rights activities. Such is not the case here. See *Dixon* v. *Alabama State Board of Education,* 294 F. 2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930; *Woods* v. *Wright,* 334 F. 2d 369 (5th Cir. 1964); *Knight* v. *State Board of Education,* 200 F. Supp. 174 (M.D. Tenn. 1961). Moreover, there is a conflict apparently among the lower courts on this subject (see *Steier* v. *New York State Education Commissioner,* (CCA 2d) 271 F.2d 13 (1959)), which this Court has not resolved. The facts of the case at bar do not lend themselves to such resolution.

III.

This Case on Its Face Is Not of Sufficient National Importance To Require Review by This Court.

In this case the lease itself appears to be valid. There appears to be no contention that, insofar as its terms relevant to this case are concerned, it is oppressive or unreasonable when compared with leases available to people in general. Neither this State nor the Nation has a legal duty to supply housing for everyone, including the very poor. Eligibility here does not give rise to a right of possession of a particular dwelling unit, since, for one thing, there are many more eligible than there are dwelling units available. The whole history and philosophy of all the Federal and State statutes on the subject is to leave the selection of tenants, from among those eligible, to the Housing Authority. But the Housing Authority is not granted by any law, any powers exceeding that of a private landlord and certainly no powers similar to administrative agencies who, by statute, are designed to administer admissions to bar or expulsion from school. To dispossess this tenant, the Housing Authority went into the Courts of the State in the same manner as any other landlord, and a hearing was had—the fairness of which has not been called in question.

To require Housing Authorities to hold official hearings before electing not to renew leases of its tenants would seem to call for legislation vesting in such Authorities powers of a Quasi Judicial nature, making them into a Court—perhaps less impartial than the established Courts of the State. In fact, as cases cited show, the Courts have consistently protected tenants' rights when there was any finding some constitutionally protected right had been violated.

CONCLUSION

For the foregoing reasons the Housing Authority of the City of Durham respectfully submits that there is no Federal Constitutional basis for Petitioner to have any absolute right to a hearing before said Housing Authority upon its election not to renew her lease. She had a hearing in the Courts of North Carolina. In this hearing before the Courts of North Carolina, Petitioner asserted her allegations that her lease was not renewed for a possibly unconstitutional reason or reasons. The lower Court found as a fact that the reason or reasons for the Housing Authority's decision not to renew Petitioner's lease was not for the possibly unconstitutional reasons which she alleged. There is no cause shown for overriding that finding. Therefore, the Housing Authority of the City of Durham respectfully submits that Petitioner's Petition for a Writ of Certiorari to the Supreme Court of North Carolina should be denied.

Respectfully submitted,

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APPENDIX

State of North Carolina Statutory Provisions

Selected Provisions of the Statutes Relating to Actions in Ejectment

§ 42-26. Tenant Holding Over May Be Dispossessed in Certain Cases.—Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:

1. When a tenant in possession of real estate holds over after his term has expired.

2. When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.

3. When any tenant or lessee of lands or tenements, who is in arrear for rent or has agreed to cultivate the demised premises and to pay a part of the crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated.

§ 42-31. Trial By Justice; Jury Trial; Judgment; Execution.—If the defendant by his answer denies any material allegation in the oath of the plaintiff, the justice shall hear the evidence and give judgment as he shall find the facts to be. If either party demands a trial by jury, it shall be granted under the rules prescribed by law for other trials by jury before a justice; and if the jury finds that the allegation in the plaintiff's oath, which entitles him to be put in possession, is true, the justice shall give judgment that the defendant be removed from and the plaintiff put

in possession of the demised premises, and also for such rent and damages as shall have been assessed by the jury, and for costs; and shall issue his execution to carry the judgment into effect.

§ 42-34. Undertaking on Appeal; When To Be Increased.—Either party may appeal from the judgment of the justice, as is prescribed in other cases of appeal from the judgment of a justice; upon appeal to the superior court either plaintiff or defendant may demand that the same shall be tried at the first term of said court after said appeal is docketed in said court, and said trial shall have precedence in the trial of all other cases, except in cases of exceptions to homesteads: Provided, that said appeal shall have been docketed at least ten days prior to the convening of said court: Provided further, that in the event the trial before the justice of the peace takes place at least fifteen days prior to the convening of said superior court, said appeal shall, upon the demand of either plaintiff or defendant, be docketed in time to be tried at said first term of said superior court after said trial before the justice of the peace: Provided, further, that the presiding judge, in his discretion may make up for trial in advance any pending case in which the rights of the parties or the public require it; but no execution commanding the removal of a defendant from the possession of the demised premises shall be suspended until the defendant gives an undertaking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be approved by the justice, to be void if the defendant pays any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land. At any term of the superior court of the county in which such appeal is docketed after the lapse of one year from the date of the filing of the undertaking above mentioned, the tenant, after legal notice to that end has been duly executed on him, may be required to show cause why said undertaking should not be increased to an amount sufficient to

cover rents and damages for such period as to the court may seem proper, and if such tenant fails to show proper cause and does not file such bond for rents and damages as the court may direct, or make affidavit that he is unable so to do and show merits, his appeal shall be dismissed and the judgment of the justice of the peace shall be affirmed.

Selected Provisions of North Carolina Statutes Relating to Examination of Parties

§ 1-568.10. Preliminary Procedure for Examination Before Examining Party's Initial Pleading Has Been Filed. —(a) Before a party has filed his complaint, petition or answer, he may, without notice to other parties, apply to the clerk or judge for an order for the examination of any person who may be examined by him as provided by G.S. 1-568.4.

(b) The application must be in the form of, or supported by, an affidavit showing:

(1) That the action has been commenced and the purpose thereof;

(2) That, in order to prepare his complaint, petition or answer, it is necessary for the applicant to secure information from the person proposed to be examined about certain matters, which mattters must be designated with reasonable particularity;

(3) That the information sought is not otherwise available to the applicant, together with a statement of the reasons therefor;

(4) That, if the person proposed to be examined is not a party, the action is being prosecuted or defended in his behalf, together with facts in support thereof;

(5) That the application is made in good faith; and

(6) That the examination should be held at a place designated in the affidavit, together with facts showing the reasons therefor.

(c) If the judge or clerk finds that the facts are as set out in the affidavit, he shall make an order:

(1) Appointing a commissioner to hold the examination;

(2) Fixing the time and place of the examination, subject to the provisions of G.S. 1-568.5;

(3) Directing the person to be examined to appear before the commissioner at such time and place for examination; and

(4) Designating the particular matters about which the person may be examined.

§ 1-568.11. Preliminary Procedure for Examination After Initial Pleadings Have Been Filed.—(a) After a party has filed his complaint, petition or answer, he may, without notice to other parties, apply to the clerk or judge for an order for the examination of any person who has also filed his complaint, petition or answer, as the case may be, or on whose behalf a complaint, petition or answer has been filed as provided by G.S. 1-568.4.

(b) The application must be in the form of, or supported by, an affidavit showing:

(1) That the action has been commenced;

(2) That the applicant has filed complaint, petition or answer;

(3) That the applicant desires to examine a designated person who has filed a petition, complaint or answer or on whose behalf a petition, complaint or answer has been filed;

(4) That the examination should be held at a place designated in the affidavit, together with facts showing the reasons therefor.

(c) If the judge or clerk finds that the facts are as set out in the affidavit, he shall make an order:

(1) Appointing a commissioner to hold the examination;

(2) Fixing the time and place of the examination, subject to the provisions of G.S. 1-568.5; and

(3) Directing the person to be examined to appear before the commissioner at such time and place for examination.